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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1978

No. 79-44

PACIFIC INTERNATIONAL RICE MILLS, INC.,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
**To the United States Court of Appeals**
**For the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals**
**For the Ninth Circuit**

Petitioner, Pacific International Rice Mills, Inc., respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit enforcing an Order of the National Labor Relations Board granting summary judgment against Petitioner herein for the unfair labor practice of refusing to bargain with the Union.

## OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 594 F.2d 1323 and appears at Appendix A, *infra*, pp. A-1—A-9.

The Decision and Order of the National Labor Relations Board is reported at 228 NLRB 464 and appears at Appendix B, *infra,* pp. B-1—B-14. The Board's denial of the Motion for Reconsideration of its Decision and Order appears at Appendix C, *infra,* pp. C-1—C-4.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether Petitioner's constitutional rights were violated by having a union member conduct the hearing on objections to the election and decide the issues therein, and by not being granted a *de novo* hearing?

2. Whether Executive Order 11491 should entitle Petitioner to a hearing *de novo* or a hearing to inquire into the Hearing Officer's possible membership in or affiliation with the petitioning labor organization?

## STATEMENT OF THE CASE

On April 25, 1975, a representation election was held in a unit of production and maintenance employees at Petitioner's Woodland, California facility. The tally of ballots showed 25 votes for and 21 votes against the petitioning labor organization, the International Brotherhood of Teamsters, Chauffeurs and Helpers of America, and 6 challenged ballots (R. 9).

The Company filed timely objections to the election, to wit, that the Union made many material misrepresentations of fact and law, made illegal promises of benefits and created an atmosphere of fear and coercion (R. 20-28). The hearing on the objections was conducted on October 29 and 30, 1975, and the Hearing Officer issued a report recommending that all objections be overruled, that the Union's challenges to two ballots be overruled since the Union withdrew its challenges at the hearing, that the Company's challenges to four ballots be sustained, and that the Union be certified as the collective bargaining representative (R. 84-91). A copy of the Hearing Officer's Report and Recommendation On Objections and Challenged Ballots appears at Appendix D, *infra,* pp. D-1—D-13.



On January 12, 1976, the Company filed exceptions to the Hearing Officer's Report, with a supporting brief (R. 92-133). On January 13, 1976, the Company filed a supplemental brief contending that it was informed and believed that the Hearing Officer was a member of the National Labor Relations Board Employees' Union and therefore a new hearing was necessary because the Hearing Officer could not resolve the credibility issues in an impartial manner (R. 134-135). At no time during the pendency of this case has the National Labor Relations Board ever denied that said Hearing Officer was a member of the National Labor Relations Board Employees' Union.

On April 2, 1976, the Board issued its Decision and Certification of Representative in which it adopted the Hearing Officer's Findings and Recommendations, and certified the Union (R. 136-138). Said Decision is reported at 223 NLRB 613 and appears, *infra,* at Appendix E, pp.

E-1—E-3. On April 13, 1976, the Company filed a Motion for Reconsideration of the Board's Decision, but the Board denied that Motion on May 19, 1976 (R. 146-147). A copy of the Order Denying Motion appears, *infra,* at Appendix F, pp. F-1—F-2.

On September 22, 1976, the Regional Director issued a complaint alleging that the Company refused to bargain in violation of Section 8(a)(5) and (1) of the National Labor Relations Act and set a subsequent hearing on the issue (R. 149-151). The Company alleged as an affirmative defense in its Answer that due to his membership in a labor organization the Hearing Officer could not be, and was not, fair and impartial in his conduct of the hearing (R. 153).

In its response to an Order by the Board to Show Cause why summary judgment should not be granted, Petitioner contended that it should be given the opportunity of a hearing on the question of the Hearing Officer's membership in an employee organization, and specifically pointed out by affidavit that the Employer then had reason to believe that the Hearing Officer was a member of an employee organization that was affiliated with the petitioning labor organization (R. 186-190).

The Board issued its Decision and Order finding that the Company violated the Act by refusing to bargain with the Union. In its Motion for Reconsideration of the Board's Decision on the Motion for Summary Judgment, Petitioner herein specifically pointed out that it was informed and believed that the Hearing Officer was a member of the same labor organization as the petitioning Union and that



it had been denied its due process right to inquire of the Hearing Officer concerning his membership in a labor organization (R. 303-305). The Board denied the Motion for Reconsideration.

In the Decision below, the Court enforced the Order of the National Labor Relations Board.

## REASONS FOR GRANTING THE WRIT

The questions in the instant case are of crucial importance to Petitioner and to other employers who are or who may become subject to the jurisdiction of the National Labor Relations Board. Petitioner is raising novel and important constitutional issues, to wit, whether its due process rights were violated by having a hearing on objections to a representation election conducted and the issues therein decided by a Hearing Officer who himself is a member of a labor organization and by not receiving a subsequent hearing *de novo*. These important constitutional issues are unsettled at the moment, and they have far-reaching consequences. These issues affect numerous employers participating in representation cases before the National Labor Relations Board. If Hearing Officers in objections to election cases can themselves be members of labor organizations, employers can never be assured that they will receive a fair and impartial hearing which is the essence of due process. The case has even profounder ramifications because the labor organization with which Petitioner is undeniably a member may be affiliated with the petitioning labor organization. The importance of these issues and their ramifications should compel a Supreme Court resolution of them.

In addition, the case involves an interpretation of Executive Order 11491, and the issue raised pertaining to that Executive Order significantly affects the administration of the Order.

For those reasons, Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted.

**A. Petitioner's Constitutional Rights Were Violated By Having A Member Of A Labor Organization Decide Objections To An Election Involving A Labor Organization And By Not Receiving A Subsequent Hearing De Novo.**

Trial before an unbiased judge or impartial decision-maker is essential to due process. *Johnson v. Mississippi,* 403 U.S. 212, 29 L.Ed.2d 423 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 25 L.Ed.2d 287 (1970).

> " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. . . . Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with different types of proceedings." *Hannah v. Larche,* 363 U.S. 420, 4 L.Ed.2d 1307, 1321 (1960).

The requirement that there be an unbiased and non-partisan trier of fact is even more rigid in an administrative proceeding such as before the National Labor Relations Board.



> "The Board does not, indeed, it could not, contest the correctness of the principle respondents invoke, for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record show that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand." *National Labor Relations Board v. Phelps, et al.,* 136 F.2d 562, 563-4 (5th Cir. 1943); *National Labor Relations Board v. National Paper Company,* 216 F.2d 859 (5th Cir. 1954); *Local No. 3, etc. v. National Labor Relations Board,* 210 F.2d 325 (8th Cir. 1954).

A hearing officer in a National Labor Relations Board proceeding reviewing an employer's objections to an election is not engaged in a mere ministerial act. He reviews the evidence, makes credibility findings regarding wit-

nesses and issues a recommended decision that for all practical purposes becomes binding upon the parties with far-reaching economic and social effects. Specifically, his decision directly leads to the final Board declaration of whether the election has been fairly conducted and whether the Union should be certified as the representative of the employees.

Each party involved in such a critical proceeding must be guaranteed that its interests and legal rights will be passed upon by an individual who will be absolutely non-partisan and impartial. However, when an individual is a member of a labor organization it is only natural that he would have a proclivity towards the goals and ideals of another labor organization whose programs and goals are generally in accord with those of his own organization. An individual who acts as an NLRB hearing officer under those circumstances would inevitably have his views tainted in favor of the participating labor organization, and employer parties to proceedings under his jurisdiction can receive no assurance that he would dispassionately view the issues before him. It is that bias and prejudice to which Petitioner was clearly subject in the instant case (See § C, *infra*), and it is that danger facing future NLRB litigants that the Court should protect against.

Petitioner herein was urging that its employees had been denied their right to a fair election due to misrepresentations of fact and law and illegal promises of benefits by the Union during the election campaign. The overruling of those objections by the Hearing Officer resulted in the Union being certified as the representative of the



employees. The Hearing Officer's recommended decision had such a profound impact on both the Company and its employees that Petitioner should have been guaranteed an impartial trier of fact, and not been made subject to the patent biases of the Hearing Officer which so clearly manifested themselves in his decision (see § C, *infra*). Petitioner's constitutional right to a hearing by an impartial trier of fact was blatantly violated by allowing a union member to preside. This violation was made even more egregious by virtue of the fact that the employee organization to which the Hearing Officer belonged could have been affiliated with the petitioning Teamsters Union.

In order that Petitioner's due process rights could be unquestionably protected, it was entitled to a hearing *de novo* before an individual who was not a member of any labor organization so that it could be assured that it would receive a fair and impartial hearing on matters of such urgent concern. The denial of Petitioner's request for a *de novo* hearing clearly violated its due process rights.

1. **Petitioner's Rights To A Hearing De Novo Is Abetted By That Portion Of The Code Of Federal Regulations Governing Responsibilities And Conduct Of Employees Of The National Labor Relations Board.**

"All employees shall avoid any action whether or not specifically prohibited by this part which result in or create the appearance of: . . . (b) giving preferential treatment to any person . . . (d) losing complete independence or impartiality." 29 C.F.R. § 100.735-11 (1967, 1973).

The Hearing Officer's membership in an N.L.R.B. employees' union at the very least created the appearance that he could no longer be completely independent or impartial as a trier of fact. When an individual belongs to an organization that is purportedly aimed at bettering the wages, benefits and working conditions of himself and his fellow employees and is then called upon to judge a matter involving an organization having purportedly identical purposes, it is inevitable that those involved in or viewing the process will believe that he will tend to be partial to the latter organization.

The Hearing Officer, a trier of fact, was charged with making a decision fundamental to the rights of the parties involved. His role is elevated in importance over other N.L.R.B. employees, and it is crucial that he not only remain absolutely neutral but give that impression. The Hearing Officer violated the aforesaid section of the C.F.R. by his mere membership in the association, and the Employer submits that it had a right to have a *de novo* hearing before an N.L.R.B. employee who is not such a member so that there would be no question of the trier of fact's impartiality.

The fair hearing requirement is so basic to due process that Petitioner should have been given a new hearing as that was the only way that its rights could have been fully protected. In view of the seriousness of the charge leveled by the Company against the Hearing Officer and the nature of the Board proceedings, the Board should have followed the prudent action that it undertook in *Filmation Associates, Inc.*, 227 NLRB 1721 (1977), wherein the charging



party tried to disqualify the Administrative Law Judge because of bias and prejudice in his conduct. The Board found no bias or prejudice but remanded before a different Administrative Law Judge quoting *Indianapolis Glove Company*, 88 NLRB 986, 987 (1950):

> "[I]t is essential not only to avoid actual partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the *appearance* of a partisan tribunal."

**B. Executive Order 11491 Entitles Petitioner To A Hearing De Novo Or To Inquire Into The Hearing Officer's Possible Membership In Or Affiliation With The Petitioning Labor Organization.**

Section 3(d) of Executive Order 11491 provides:

> "Employees engaged in administering a labor-management relations law . . . shall not be represented by a labor organization which also represents other groups of employees under the law . . . or which is affiliated directly or indirectly with an organization which represents such a group of employees." 3 C.F.R. 512 (1971).

The principle involved in this Executive Order would be vitiated if a party could not inquire into a hearing officer's possible membership in a petitioning labor organization. The ability to conduct such an inquiry is what Petitioner has timely and consistently sought, but has been consistently denied. Without that ability, E.O. 11491 is rendered a nullity as Petitioner would not have the opportunity of ascertaining whether § 3(d) has been violated.

The Court should grant *certiorari* in this case because the issue involved is significant in the administration of the

aforesaid Executive Order. *United States v. Ruzicka,* 329 U.S. 287, 91 L.Ed. 290 (1946). In addition, certiorari should be granted because it is an important case of first impression under the applicable Executive Order. *American Federation of Musicians v. Wittstein,* 379 U.S. 171, 13 L.Ed.2d 214 (1964).

If that Executive Order is going to have any real significance, parties to National Labor Relations Board proceedings must be able to inquire into the affiliations of a trier of fact when they in good-faith believe that that trier of fact may actually belong to a labor organization that is affiliated with a party to the proceedings. Only by allowing parties the opportunity to inquire whether a trier of fact is represented, directly or indirectly, by a union (such as the petitioning labor union herein) that also represents employees under the law which the trier of fact is charged with administering, may the Executive Order have any real force and effect.

As soon as it had reason to believe that the Hearing Officer belonged to an employee organization that was affiliated with the petitioning labor organization, Petitioner herein presented an affidavit to the Board on that point and requested an opportunity to inquire into the Hearing Officer's membership in an employee organization. It presented this affidavit at the earliest time practically available to it—in response to the Order to Show Cause after the scheduled trial on the refusal to bargain charge had been cancelled. The obvious time for Petitioner to present this new information would have been at the trial on the unfair labor practice, but when that became impossible



due to the summary Board action the most propitious time to present it was in response to the Order to Show Cause. Hence, Petitioner was not dilatory in presenting this new information, but yet it was consistently denied the opportunity to inquire into the Hearing Officer's membership in an employee organization and whether his organization was affiliated with the Teamsters.

Clearly, if the Hearing Officer's union was affiliated with the petitioning Union, it would be the epitome of the denial of due process for that Hearing Officer to have conducted the hearing, rendered findings of fact and made a recommended decision in the case. The manifest injustice and damage to the Petitioner which reasonably would have resulted (and which Petitioner submits did result—see § C, *infra*) compels this Court to grant the petition for extraordinary writ to allow Petitioner the opportunity to make the necessary inquiries.

### C. In His Decision The Hearing Officer Clearly Demonstrated His Bias.

In his Decision (App. D) the Hearing Officer ignored one of the central points raised by the Petitioner herein in its brief to him to wit, that the chief employee witness on behalf of the petitioning labor organization without question lied on the witness stand (R. 70-71). That individual, Mr. Daniel Barrus, was asked by the attorney for the Employer what he had discussed on the day of the hearing prior to his testimony. It was then stipulated by counsel for the petitioning Union that he had in fact discussed certain union meetings with Mr. Barrus prior to his appearing on the witness stand. Even after that stipulated

admission by counsel for the Union, Mr. Barrus maintained under oath that he had never discussed the subject of his testimony with the Union's attorney. The Union's attorney then reaffirmed that he had indeed discussed Barrus' testimony with him prior to his taking the stand (Tr. 235-240).

Not only did the Hearing Officer fail to refer to his glaring example of falsity under oath, but he amazingly went on to credit the testimony of Barrus without reservation, completely ignoring his meanderings, his glaring inconsistencies and his outright lies. Such crediting by the Hearing Officer clearly demonstrates that he was biased, and urgently compels the right of Petitioner to receive a trial *de novo* or to inquire into his union affiliation and activities.

## CONCLUSION

For the reasons set forth herein, this Petition for Writ of Certiorari should be granted.

DATED: July 6, 1979.

Respectfully submitted,
LITTLER, MENDELSON, FASTIFF & TICHY
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**(Appendices Follow)**

## Appendices

## Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 77-4034

National Labor Relations Board,
Petitioner,
vs.
Pacific-International Rice Mills, Inc.,
Respondent.

[Filed Apr. 17, 1979]

Petition to Review a Decision of the National Labor Relations Board

### OPINION

Before: BROWNING and CARTER, Circuit Judges, and WOLLENBERG,* District Judge

WOLLENBERG, District Judge:

The National Labor Relations Board (NLRB), pursuant to the National Labor Relations Act (NLRA), as amended, 29 U.S.C. §§ 151 *et seq.*, seeks enforcement of its order granting summary judgment against respondent, Pacific International Rice Mills, Inc., for the unfair labor practice of refusing to bargain with the union,[1] in violation of sec-

[1]Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

*Honorable Albert C. Wollenberg, United States District Judge, Northern District of California, sitting by designation.

tion 8(a)(1) and (5) of the NLRA, 29 U.S.C. §§ 158(a)(1), (5). Respondent contests the underlying representation election and certification of the union as collective-bargaining representative on the grounds that there does not exist substantial evidence in the record supporting the NLRB's findings of fact and that the hearing officer, whose findings and recommendations the NLRB adopted, was improperly biased against the employer because of his union membership. The Court rejects respondent's contentions and grants the NLRB's petition for enforcement of its order.

## FACTS

This controversy arose out of a disputed representation election held in April, 1975, at respondent's Woodland facility. The tally of ballots showed twenty-five votes for and twenty-one votes against the union, and six challenged ballots. The NLRB directed a hearing on the challenged ballots and on fifteen of eighteen objections to the election that the company had timely filed. The objections alleged that the union made many material misrepresentations on subjects such as benefits, the pension and profit-sharing plans, and strike votes, unlawfully interrogated employees, coerced employees to vote for the union, and created an atmosphere of fear and coercion. In addition, the company argued that the cumulative effect of the numerous misrepresentations made by the union agent, combined with the exteremely close vote, mandated that the election be set aside.

A hearing examiner considered evidence presented at a hearing in October, 1975, and the company's post-hearing brief, and issued a report recommending that the NLRB



overrule all objections except the company's challenges to four ballots, and certify the union as the collective-bargaining representative as the challenges were not determinative of the election. The company filed exceptions to the hearing examiner's report and a supplemental brief contending that the examiner could not have acted impartially because he is a member of the National Labor Relations Board Employees Union. In April, 1976, the NLRB adopted the hearing examiner's findings and recommendations and certified the union; the NLRB denied reconsideration of these actions.

In September, 1976, the Regional Director of the NLRB issued a complaint that the company refused to bargain pursuant to a union request in violation of section 8(a)(1) and (5) of the NLRA, 29 U.S.C. §§ 158(a)(1), (5). The company answered that it had insufficient knowledge of the union's status as a labor organization and denied that the union had requested bargaining and that it had refused. Respondent-company also renewed its contention that the April, 1975, election should be set aside. Following a motion for summary judgment and issuance of an order to show cause by the NLRB, respondent, in its response to the order to show cause filed in November, 1976, raised the defense that after the representation hearing, information had come to its attention that the union to which the hearing examiner belongs might be affiliated with the labor organization involved in the action at hand, the Teamsters Union.

In February, 1977, the NLRB issued a decision and order, which it has refused to reconsider, granting the motion for summary judgment based on a finding that there

was no new evidence or special circumstances showing error in the representation case.[2] It found that respondent violated section 8(a)(1) and (5) of the NLRA by refusing to bargain with the union and ordered respondent to cease and desist from such refusal and to bargain upon request with the union, and if an agreement is reached, to embody it in a signed contract and to post appropriate notices.

## DISCUSSION

In order to determine whether to enforce the NLRB order, the Court must decide whether the NLRB reasonably exercised its broad discretion in conducting representative elections by overruling respondent's election objections and therefore finding that the company's refusal to bargain with the certified representative of its employees violated sections 8(a)(1) and (5) of the NLRA. Respondent carries a heavy burden to overcome the presumption of correctness of the NLRB determination that the election reflected the employee's free choice. *See, e.g., N.L.R.B. v. Sauk Valley Manufacturing Co., Inc.*, 486 F.2d 1127 (9th Cir. 1973). "If the findings of the [NLRB] are supported by substantial evidence on the record considered as a whole, they are conclusive; and so long as the Board did not misapply the law, the order is to be affirmed." *N.L.R.B. v. Heath Tec Division/San Francisco*, 566 F.2d 1367 (9th Cir. 1978).

1. *Hearing Examiner's Review of the Record.*

The NLRB specifically adopted the findings of the hearing examiner. Record at 137. His determination of the validity of the respondent's objections relied upon credi-

[2]228 N.L.R.B. 464 (1977).



bility determinations. At the hearing on the objections, four of respondent's employees appearing on its behalf[3] testified that the union agent, Tony Santos, had made certain statements at two organizational meetings held on April 8, and April 12, 1975, upon which the objections were based. A fifth employee, Wesley Medlin, testified that Santos had abusively asked him to leave one meeting because of Santos' belief that Medlin was pro-employer. Santos denied making any of the objectionable statements attributed to him by these witnesses. Another employee, Daniel Barrus, supported Santos' testimony.

The hearing examiner accepted the testimony of Santos and Barrus on the ground that the other testimony was "internally self-contradictory, collectively inconsistent, the product of faulty memory, and to a large part based on subjective determinations of what Santos meant rather than what he stated." Record at 89.[4] This Court will not disturb credibility resolutions "unless a clear preponderance of all the relevant evidence convinces that they are incorrect." *N.L.R.B. v. International Longshoremen's & Warehousemen's Union & Local 27*, 514 F.2d 481, 483 (9th Cir. 1975); *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 846 (9th Cir. 1967).

The hearing examiner's opinion properly demonstrates that substantial evidence in the record supports the reasoning underlying his credibility determination. Employees Jojo and Lang both contradicted themselves on the key

[3]Richard Jojo, Lonnie Long, Donald C. Eisenhart, and Kenneth O. Peak all testified on the respondent's behalf.

[4]The hearing examiner did not ignore the alleged inconsistencies in the testimony of Barrus and Santos, as respondent claims, but rather upon analysis viewed them as nonexistent. Record at 89.

question of what Santos promised that union victory would mean to the employees. On the one hand, they testified that Santos stated that certain benefits would accrue immediately upon union victory, Transcript at 37, 56, but, on the other hand, they also testified that Santos stated that these same benefits would be subject to collective bargaining. Transcript at 36, 66-67. Employees Eisenhart and Peak consistently stated that Santos promised that benefits such as retirement plans and insurance coverage would "automatically" take effect upon union victory. While they admitted that Santos explained collective bargaining, they maintained that he never stated that benefits would be subject to bargaining. This distinction appears rather confused and subjective, especially considering Lang's contradictory admission that Santos stated at the meeting Eisenhart and Peak attended that everything would be part of collective bargaining. Transcript at 66-67. In light of these contradictions and inconsistencies, this Court could not find that a clear preponderance of all the relevant evidence weighs against the hearing examiner's credibility determination.

The hearing examiner also properly disregarded Medlin's testimony. None of the witnesses who attended the meeting at which Medlin appeared corroborated his testimony. The evidence pertaining to Medlin's status as a clerk at a separate facility, as opposed to being a warehouseman at Woodland, supports Santos' explanation that he asked Medlin to leave the meeting because of Medlin's apparent ineligibility to vote. Finally, even if Santos made such statements to Medlin, they would not constitute sufficient evidence to show that an atmosphere of fear and coercion pervaded the election.



2. *Hearing Examiner's Membership in a Union.*

Respondent has urged on various grounds that the hearing examiner's alleged membership in the National Labor Relations Board Employees Union and the NLRB's refusal to hold a hearing on the potential affiliation of that union with petitioner-union denied it due process. The Court concurs in the NLRB's rejection of these claims.

A hearing examiner's membership in a union will not ordinarily violate an employer's right to a fair hearing. *See generally, Abbott Laboratories, Ross Laboratories Division v. N.L.R.B.*, 540 F.2d 662, 665 n.1 (4th Cir. 1976) (holding that a hearing officer's possible membership in the same union as a witness would not show that he had an interest in the litigation). Executive Order 11491 gives each federal employee the right to participate in labor organizations:

> Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority.

Exec. Order No. 11491 § 1(a) 3 C.F.R. 510 (1971). The fact that the order prohibits federal "employees engaged in administering a labor-management relations law" from mem-

bership in certain unions, Exec. Order No. 11491 § 3(d) 3 C.F.R. 512 (1971),[8] indicates that the order intended to cover NLRB employees.[9]

Respondent's failure to show that the hearing examiner's union was one of those covered by section 3(d) establishes the propriety of his union status. In addition, the record clearly evidences the hearing examiner's impartiality. He took an active interest at the hearing questioning both employer and employee witnesses. Substantial evidence in the record supports his well-documented findings.

Several months after the NLRB's consideration of the employer's objections to the certification election, during the unfair labor practice proceeding, the employer resubmitted its demand for a hearing on the issue of the hearing examiner's union status. Record at 184. In these papers, the employer made the additional claim that the hearing examiner's union might be affiliated with petitioner's union in violation of section 3(d).

The NLRB properly refused to reconsider this claim. In the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in an

[8]This section provides:
Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.

[9]The NLRB also implied that it would be placed in an impossible quandary if mere membership in a union could disqualify a hearing examiner. Since many of its employees are in an employee's union or perform management or supervisory duties for the agency, it would be hardpressed to provide hearing examiners that would not be subject to similar union or employer objections. Record at 137-38.



unfair labor practice proceeding is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. *N.L.R.B. v. Decoto Aircraft, Inc.*, 512 F.2d 758, 761 (9th Cir. 1975). Respondent provides no justification for its failure to raise the question of union affiliation at the time of the representation proceeding when it first objected to the hearing examiner's union membership.

Accordingly, the NLRB's petition for enforcement of its order is granted.

## Appendix B

United States of America

Before the National Labor Relations Board

Case 20—CA—11808

Pacific International Rice Mills, Inc.

and

Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

### DECISION AND ORDER

Upon a charge filed on August 16, 1976, by Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Pacific International Rice Mills, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 20, issued a complaint and notice of hearing on September 22, 1976, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 2, 1976, following a Board election in Case 20—RC—12582, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about August 3, 1976, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Subsequently, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, submitting affirmative defenses, and requesting that the complaint be dismissed in its entirety or that it be awarded whatever further relief is just and proper.

On October 26, 1976, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and motion to strike portions of Respondent's answer, with brief in support thereof and appendixes attached. The General Counsel requests that portions of Respondent's answer be stricken as sham and false and that the Board take official notice of the record in the underlying representation proceeding. The General Counsel submits, in effect, that Respondent, in its answer, is seeking to relitigate issues previously litigated in the prior representation proceeding and that there are no issues of law or fact requiring a hearing. He, therefore, requests that the motions be granted. Subsequently, on November 10, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, with attachments, and the General Counsel filed an opposition thereto.

[1]Official notice is taken of the record in the representation proceeding, Case 20—RC—12582, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 N.L.R.B. 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9 (d) of the NLRA, as amended.



Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its response to the Notice To Show Cause, with attachments,[2] as well as in its affirmative defenses in its answer to the complaint, Respondent raises substantially

[2]As an attachment, Respondent has submitted an affidavit of Wesley J. Fastiff the attorney who represented the Respondent at the hearing in the underlying representation proceeding which the Respondent alleges as newly discovered evidence. The Respondent argues that the Hearing Officer's alleged membership in an employee association prevented him from being impartial. This very argument had been raised in Respondent's exceptions to the Hearing Officer's report in this case. However, the Board in its Decision and Certification of Representative, 223 NLRB No. 88, issued on April 2, 1976, after having considered the Respondent's objections, and the Hearing Officer's report recommending disposition of same, and after reviewing the record in light of Respondent's exceptions

the same matters that it raised in the underlying representation case. The Respondent's answer attacks the validity of the election and the resulting certification, and it denies that the Union is the collective-bargaining representative of the employees in the bargaining unit.[3]

Thus, the Respondent's answer to the complaint and the affirmative defenses therein, as well as its response to the Notice To Show Cause which argues that its objections to the election and exceptions raised issues warranting a hearing, merely reiterate the issues previously raised and considered in the representation case.

It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances, not to permit litigation in an unfair labor practice case of issues which were or could have been

and brief in support thereof, adopted the Hearing Officer's findings and recommendations, and explicitly stated therein that Respondent's argument on this basis had no merit and that, furthermore, after having read the record closely, there was no evidence of prejudice or bias on the Hearing Officer's part.

[3]By its answer, Respondent asserts that it does not have sufficient knowledge of the Union's status as a labor organization. A determination was made in the underlying representation proceeding, Case 20—CA—12582, that the Union is a labor organization and, accordingly, it is not subject for litigation in the instant unfair labor practice proceeding. The Respondent also denies that the Union has requested and that the Respondent has refused to bargain. Attached to the General Counsel's Motion for Summary Judgment is a letter dated July 30, 1976, from the Union to the Respondent requesting bargaining, and a letter dated August 3, 1976, from the Respondent refusing to bargain. In its response to Notice To Show Cause, the Respondent does not seek to controvert the contents or the receipt of the letter attached to the General Counsel's motion. Accordingly, we shall deem these allegations of the complaint to be admitted. *Schwartz Brothers, Inc., and District Records, Inc.*, 194 NLRB 150 (1971); *The May Department Stores Company*, 186 NLRB 86 (1970); *Carl Simpson Buick, Inc.*, 161 NLRB 1389 (1966).



litigated in a prior representation proceeding.[4] It is clear that the Respondent had, and exercised, the opportunity in the representation proceeding in Case 20—RC—12582 to raise the issues in its answer to the complaint and its response to the Notice To Show Cause.

All issues raised by the Respondent in this proceeding except as to the alleged "newly discovered evidence" which we have found to be without merit, were or could have been litigated in the prior representation proceeding, and the Respondent has not offered to adduce at a hearing any relevant newly discovered or previously unavailable evidence, nor are there any special circumstances herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.[5]

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. *The Business of the Respondent*

Respondent, a California corporation, having its main place of business in Woodland, California, is engaged in the milling and wholesaling of rice. During the past calendar year, in the course of its operations in California,

[4]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5]Having granted the Motion for Summary Judgment, we find it unnecessary to pass upon the motion to strike portions of Respondent's answer.

Respondent has sold products valued in excess of $50,000 directly to customers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. *The Labor Organization Involved*

Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Unfair Labor Practices*

A. *The Representation Proceeding*

1. *The unit*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production, warehouse, maintenance, and general labor employees, truckdrivers and forklift operators employed by Pacific International Rice Mills, Inc., at Kentucky Avenue and Highway 113, Woodland, California, excluding office clericals, guards and supervisors as defined in the Act.

2. *The certification*

On April 25, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted



pursuant to a Stipulation for Certification Upon Consent Election, under the supervision of the Regional Director for Region 20, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on April 2, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 30, 1976, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 3, 1976, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since August 3, 1976, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The Remedy*

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).



The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. Pacific International Rice Mills, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production, warehouse, maintenance, and general labor employees, truckdrivers and forklift operators employed by Pacific International Rice Mills, Inc., at Kentucky Avenue and Highway 113, Woodland, California, excluding office clericals, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 2, 1976, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 3, 1976, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is en-

gaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Pacific International Rice Mills, Inc., Woodland, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production, warehouse, maintenance, and general labor employees, truckdrivers and forklift operators employed by Pacific International Rice Mills, Inc., at Kentucky Avenue and Highway 113, Woodland, California, excluding office clericals, guards and supervisors as defined in the Act.



(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Woodland, California, facility, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., February 28, 1977.

Betty Southard Murphy, *Chairman*

Howard Jenkins, Jr., *Member*

Peter D. Walther, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)



## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production, warehouse, maintenance, and general labor employees, truckdrivers and forklift operators employed by Pacific International Rice Mills, Inc., at Kentucky Avenue and Highway 113, Woodland, Cali-

fornia, excluding office clericals, guards and supervisors as defined in the Act.

PACIFIC INTERNATIONAL RICE MILLS, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415—556-0335.



## Appendix C

United States of America

Before the National Labor Relations Board

Case 20-CA-11808

Pacific International Rice Mills, Inc.

and

Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

### ORDER DENYING MOTION

On February 28, 1977, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(5) of the National Labor Relations Act, as amended, and ordering that Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices.

Thereafter, on March 17, 1977, the Respondent filed a Motion for Reconsideration and brief in support thereof, submitting that the Board made material errors in that the Board erroneously misconstrued the affidavit of Wesley J. Fastiff, the attorney who represented Respondent at the hearing in the underlying representation proceeding,

[1] 228 NLRB No. 65.

and misconstrued the Respondent's brief in opposition to the General Counsel's Motion for Summary Judgment. The Respondent submits that not only did it argue the hearing officer's mere membership in an employee organization, but it argued that the hearing officer *actually* belonged to the *same* labor organization as the petitioner.[2]

At pages 2 and 3 of Respondent's brief in opposition to the General Counsel's Motion for Summary Judgment, Respondent states that at the time of the hearing it was not aware of the fact that the hearing officer was a member of "a" labor organization; of the hearing officer's membership in "an" employee organization; and that according to Mr. Fastiff's affidavit, after completion of the Hearing, it became aware of the hearing officer's membership in "an" organization and that said organization "might be" affiliated with the petitioning labor organization. With respect to Mr. Fastiff's affidavit, he refers to "an" employee organization therein several times and states that on information and belief the employee organization to which the hearing officer belonged was affiliated with Petitioner.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's Motion for Reconsideration be, and it hereby is, denied. From the above notations to Respondent's brief in opposition to the General Counsel's Motion for Summary Judgment and to the affidavit which accompanied that brief, it is clear

[2]On March 24, 1977, counsel for the General Counsel filed an Opposition to Respondent's Motion for Reconsideration alleging, in effect, that Respondent has not offered or produced any evidence that the Hearing Officer was a member of an employee association which was associated with the Charging Party and that the Motion be denied. On April 4, 1977, Respondent filed a reply in opposition thereto.



that the basic thrust of Respondent's argument therein was that the Hearing Officer's mere membership in any labor organization rendered it impossible for the Hearing Officer to be impartial. Indeed, in its third affirmative defense listed in its answer to the complaint herein, Respondent stated its argument on the issue thus: "Respondent alleges that due to his membership in *a* labor organization, the Hearing Officer in the hearing on Employer's Objections to the Election could not be, and was not, fair and impartial in his conduct of hearing. [Emphasis added.] There was no argument there that the Hearing Officer was a member of an organization that "might be" affiliated or "was" affiliated with the Charging Party.

Moreover, to the extent that the Board would consider separately Respondent's contention that the Hearing Officer was a member of an organization which "might be" or "was" affiliated with the Charging Party, the Board rejects that contention as untimely. As noted above, the contention on the Hearing Officer's status in a labor organization was first raised by Respondent, and rejected by the Board, in the representation proceeding herein. That same contention was raised in Respondent's answer to the complaint. It was only in Respondent's response to the General Counsel's motion seeking summary judgment that Respondent first raised, as one part of its defense on the issue, the contention that the Hearing Officer was a member of an organization which had some possible affiliation with the Charging Party. In such circumstances where Respondent was able to allegedly discover and argue the issue of the Hearing Officer's status in a labor organization in the representation proceeding, the Board concludes that it has not

been shown that the organization's alleged ties to the Charging Party was evidence which was newly discovered or previously unavailable. Accordingly, Respondent contentions on that point are deemed untimely.[3]

Dated, Washington, D.C., May 25, 1977.
By direction of the Board:

George A. Leet

Associate Executive Secretary

[3]The disposition made on this issue makes it unnecessary for the Board to consider whether Respondent's "information and belief," as its assertion may be characterized, that the Hearing Officer belongs to an employee organization which is affiliated with the Charging Party, is sufficient to support the grant of a hearing, as Respondent seeks, where Respondent has offered not a single fact in support of its contention.

## Appendix D

United States of America
Before the National Labor Relations Board

Case No. 20-RC-12582

Pacific International Rice Mills, Inc.
Employer

and

Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
Petitioner

*Wesley J. Fastiff, Esq.*
*William F. Terheyden, Esq.*
for the Employer

*Neil Bodine, Esq.*
for the Petitioner

Before: *Bernard T. Hopkins*
Hearing Officer

### HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS AND CHALLENGED BALLOTS

Pursuant to a Stipulation for Certification Upon Consent Election approved March 18, 1975,[1] an election by secret

[1]All dates herein refer to calendar year 1975, unless otherwise specified.

ballot was conducted on April 25 in a unit of all production, warehouse, maintenance and general laborer employees, truck drivers and fork lift operators of the Employer, employed at Kentucky Avenue and Highway 113, Woodland, California; excluding office clerical, guards and supervisors as defined in the Act. The official tally of ballots furnished the parties at the conclusion of the election showed that of approximately 52 eligible voters, 25 cast ballots for and 21 cast ballots against the Petitioner. There were 6 challenged ballots which are sufficient in number to affect the results of the election.

On May 1, the Employer filed timely objections to the election, a copy of which was duly served on the Petitioner.

Pursuant to the Board's Rules and Regulations, the Acting Regional Director investigated the objections and on July 1, issued and served upon the parties her report on Objections and Challenged Ballots, Order and Notice of Hearing. In her report the Acting Regional Director found Objections 5, 6, 7, 9, 11, 14 and 17 without merit and recommended that they be overruled. She further found that Objections 1, 2, 3, 4, 8, 10, 12, 13, 15, 16, and 18 raise substantial and material issues of fact which can best be resolved by a hearing. She also found that the investigation of the challenged ballots of Constance Santa Maria, Wesley Medlin, James Cantrell, Daniel Johnson, Mike Lamburt and David Narbaiz disclosed substantial and material issues which can best be resolved by a hearing. The Employer thereafter filed timely exceptions and a supporting brief to the Acting Regional Director's Report with respect to Objections 6, 7, 11 and 17. On August 27th, the Board ordered that a hearing to held before a duly designated Hearing Officer for the purpose of receiving evidence to resolve the issues raised



by Employer's Objections 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17 and 18, and the challenges to the ballots of the six employees named above.

Pursuant to the Board's Order, the hearing was held before the undersigned Hearing Officer in San Francisco, California on October 29th and 30th. All the parties were duly served with copies of the Board's Order and the Notice of Hearing. The parties were represented by counsel and afforded full and complete opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence. Upon the entire record in this proceeding, I make the following resolutions of credibility of the witnesses, findings of fact, conclusions of law and recommendation to the Board.

## THE OBJECTIONS

The Employer's Objections are set forth in the numbered paragraphs below:

1. The Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America (hereinafter referred to as "the Union"), made material misrepresentations of fact to the employees.

2. The Union made material misrepresentations of law to the employees.

3. The Union promised the employees that they would definitely receive certain benefits if the Union won the election and/or obtained a contract with the Employer, which benefits said employees would not be able to receive.

4. The Union gave categorical promises of benefits to the employees if they would vote for the Union.

6. The Union made material misrepresentations to employees about its current contracts, contents thereof, and the status, number and identity of employers and employees currently parties thereto or covered thereby.

7. The Union unlawfully interrogated employees including their election preferences.

8. The Union had special knowledge regarding how people would vote in the election and openly used this knowledge in influencing employee's votes.

10. The Union made material misrepresentations to employees concerning collective bargaining.

11. The Union made material misrepresentations to employees concerning the risks to employees in the event the Union were to win the election and/or if they voted for the Union.

12. The Union made material misrepresentations to employees about Union strike authority and procedure.

13. The Union made material misrepresentations to employees concerning the obligation to pay Union dues.

15. The Union coerced employees to cause them to vote for the Union.

16. The Union made material misrepresentations to employees concerning the legal effect and consequences of the results of the election and their vote.

17. The Union made material misrepresentations to employees about the Union's legal duties and the employees' rights if the employees were to vote for the Union by a narrow majority.

18. The pervasive atmosphere of violence, fear, intimidation, and terror interfered with the election and the necessary laboratory conditions. Copies of certain confidential financial documents of the Employer were removed from the Employer's control without its permission and under circumstances unknown to Employer. Figures from said documents were subsequently utilized by the Union in an improper manner.



Witnesses presented by the Employer testified that Union organizer Tony Santos told them that they would be given full credit under the Teamster's pension plan for all of their prior year's service; that they would not lose any of the money that had been contributed by the Employer to the existing profit sharing plan on their behalf; that they would receive superior insurance coverage if the Union won the election; that their benefits would be equal to or superior to those enjoyed by employees under the Rice Growers Association contract; and that they would have a superior seniority system. The witnesses presented by the Employer further testified that Santos said that each of the above benefits would be effective as soon as the Union won the election. Santos, according to the witnesses, did not advise the employees that they could not and would not receive such benefits unless and until the Union and the Employer agreed upon them in negotiations leading to an eventual collective bargaining agreement. The Employer witnesses also testified that Santos said that they would have to join the Union within thirty days after the election "or else", and that if a strike were called, they would have to go on strike "or else". They further quote Santos as stating that in the event of a strike an employee could not find other work without the Union's permission. The Employer witnesses also stated that Santos said that if an employee lost his job he would have to utilize the services of a Union attorney in an effort to regain the job, and would not be permitted to use counsel of his own choice. The Employer witnesses testified

that at the April 8th meeting Santos told employee Wesley Medlin that he knew why the Company had put him on the list and that he (Santos) knew how Medlin was going to vote, and directed Medlin to leave the room.

Santos denies the statements attributed to him by the Employer witnesses. More particularly, Santos asserts he told the employees that for each year of employment under the Teamster's pension plan they would receive credit for two years of service with the Employer before they had been covered under the Teamster plan. Santos testified that he was asked a question about the existing profit sharing plan. He told the employees that he couldn't say too much about it as he didn't know much about it, and that they should rely on past practice and discuss the matter with the Employer. He denied that he made comparisons between the Rice Grower's Association agreement and a probable agreement with this Employer as he was unfamiliar with the Rice Grower's Association agreement other than the wage structure. Santos further testified that at no time did he state that any benefits would automatically follow an election in which the Union obtained a majority. He told them that they were all subject to negotiation with the Employer for a possible collective bargaining agreement and that he could not promise them anything. Similarly, Santos denies he told the employees that they would have to join the Union thirty days after the election as that was also a subject to be covered within collective bargaining. Santos testified that, in response to questions from the floor, he told employees that if there was a strike at another employer's place of business which was a supplier of their own, that they would not be required to cease work for their



own employer. He also told them that a two-thirds majority vote would be required before they could go on strike when the Union failed to get a contract from the Employer.[3] He testified he told them that during a strike they would be able to utilize the services of a Union attorney if they were discharged. Santos testified with respect to the Wesley Medlin incident, that he merely advised Medlin that it was the Union's position at that time that Medlin was an official clerical employee and would not be included in the unit. Santos said that he suggested to Medlin that perhaps he should leave the meeting and that Medlin did so. (Medlin was challenged by Petitioner on the date of the election as an office clerical employee). Santos denies that he told Medlin he knew how he would vote.

I credit Santos and do not credit the witnesses presented by the Employer for reasons based upon an analysis of their testimony. Employee Richard Jojo testified that Santos stated that insurance coverage would start after the Union had won the election and the employees had joined the Union. Jojo also quotes Santos as stating that insurance coverage would have to be negotiated, discussed and voted on by the employees. Jojo testified that it was his *impression* that if a person didn't join the Union within thirty days after the election, they would not be allowed to continue their employment. He also testified that *Santos* made this *statement*, but later in his testimony

[3]The Employer in its brief contends that Santos misrepresented the Union's by-laws in that the Executive Board is authorized to call a strike. The Employer cites that section of the by-laws dealing with existing agreements. Santos was speaking of negotiations for the initial agreement. The by-laws provide, in that situation, the Executive Board may limit the vote to the employees affected.

stated his *understanding* was that when a Union wins an election conducted by the Labor Board that the Union shop is something that *automatically* follows.

Employee Lonnie Lang testified that Santos stated that all of the benefits would go into effect "once the Union won the election". He also testified that Santos said that the pension plan would be a subject for negotiations after the Union won the election, and that there would be collective bargaining. Lang testified that Santos said with reference to collective bargaining, that the Union and the Employer would discuss wages, seniority basis, pension program and medical and dental benefits.

Employee Donald Eisenhart testified that employees would receive improved benefits when the Union won the election. On cross-examination Eisenhart stated that Santos discussed collective bargaining with the Employer which would concern wages and working hours but not benefits such as retirement plans, insurance and medical-dental coverage. Eisenhart did testify that Santos explained that the first step would be to get all the employees together and draft an agreement which would then be presented to the Employer. If the Employer rejected it, then the cycle would be started all over again, and the final contract would have to be approved by all the employees.

Employee Kenneth Peak testified in a similar fashion to Eisenhart and was able to clearly remember those precise benefits which would be implemented as soon as the Union won the election, but was rather vague as to what benefits and other working conditions were listed by Santos



as subjects of collective bargaining. Peak stated at one point in his testimony that certain benefits would accrue to the employees "automatically" if the Union won the election, but at another point in his testimony stated that Santos did not use the word "automatically" but in fact, that was Peak's word, based on his own subjective interpretation of what he thought Santos meant.

I find the foregoing testimony to be internally self-contradictory, collectively inconsistent, the product of faulty memory, and to a large part based on subjective interpretations of what Santos meant rather than what he stated. Contrary to the Employer's brief (pp. 30-31), I do not find the testimony of Santos and Petitioner witness Barrus to be inconsistent.

The Employer asserts Santos testified he didn't discuss the RGA contract at all whereas Barrus stated Santos told the employees they could use it as an outline in drafting their own agreement. The record evidence is that Santos testified he volunteered no statements about the RGA contract but that employees asked questions concerning it which he could not recall. Barrus testified Santos said the RGA contract could be used as an outline, together with other contracts, for their own, but that the whole matter was negotiable with the Employer. The Employer asserts Santos testified that during a strike the employees would work out of the hiring hall whereas Barrus stated Santos said they could work wherever they pleased. The record evidence is that Santos testified he told them if they wished to they could work out of the hiring hall but said nothing else on the subject, *i.e.*,

telling them they *must* work out of the hiring hall as testified to by Employer witnesses. The Employer asserts Santos testified he did not discuss the use of a Union attorney in case of a discharge whereas Barrus testified Santos said he could use the Union attorney or his own. The Employer witnesses testified Santos told them they had to use the Union's attorney and not their own. Barrus stated Santos did not say this but that he did say they had the option of using a Union attorney or their own. I view the testimony of Santos and Barrus as a consistent denial of the statements attributed to Santos by Employer witnesses on this subject.

The Employer also contends in its brief that the Union made material misrepresentations through its 4-page leaflet (Empl. 2). The first is that it stated a "labor attorney" will negotiate for the employees. The second is that the employees could decertify the Union even if it was selected. The leaflet enumerates certain types of union officials who participate in negotiations, including attorneys. It is not clear from the language itself that all of these individuals participate in all the negotiations for all contracts. The Employer contends that the reference to decertification proceedings is misleading in that it does not explain the rule of prev nting elections within the same unit within 12 months nor the contract bar rule. The leaflet states merely that there is a procedure available to employees by the National Labor Relations Board which enables them to "get rid of the union" if, at some future time they don't want it. As a general explanation of Board procedures, it is correct. It is noteworthy, in



view of the thrust of the objections in their entirety, that the leaflet states the union can promise nothing but "will try to obtain the most desirable work benefits to meet your needs." I find that the exhibit does not support the Employer's position.

I further find that objection No. 18 does not turn on a credibility resolution. No evidence was submitted in support of the facts alleged. The balance of the objection is conclusionary.

Accordingly, I shall recommend that all the objections be overruled.

## THE CHALLENGED BALLOTS

The ballots of Constance Santa Maria, and Wesley Medlin were challenged by Petitioner on the asserted ground that they were office clerical employees and therefore excluded from the bargaining unit. The Petitioner withdrew its challenges to those ballots at hearing and thus I will recommend that said challenges be overruled. The ballots of James Cantrell, Daniel Johnson, Mike Lamburt and David Narbaiz were challenged by the Employer on the asserted ground that they were discharged on January 24th and had not been reemployed as of the date of the election. The record reveals that these four employees were terminated as part of a seasonal reduction in force and were among a total layoff of approximately nine employees in the packing department. The Employer maintains an on-call list when it desires to augment its work force, but a decision was made not to place these four on that list because they were below the standards the Employer prefers to expect of its employees.

However, Cantrell, Johnson and Narbaiz were reemployed in early October. There is a dispute in the testimony as to whether these individuals were rehired because they appeared at the plant and actively solicited work or upon the Employer's initiative. I find it unnecessary to resolve this dispute for the reasons set forth below. To be eligible to vote in a Board election, a person must be in an employee status during the payroll period immediately preceding the date of the stipulation of certification and also on the date of election. The standard applicable to the eligibility of laid-off employees who were not actively employed on the date of the election is whether there exists a reasonable expectancy of employment in the near future. It is concluded that in the instant case the four individuals whose ballots were challenged did not have a reasonable expectancy. The fact that three of them were in fact rehired in October cannot retroactively confer upon them an employee status in April. Accordingly, I shall recommend that said challenges be sustained.

## RECOMMENDATION

Upon all of the foregoing, the undersigned recommends to the Board that objections 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17 and 18 be overruled; that the challenges to the ballots of Constance Santa Maria and Wesley Medlin be overruled; that the challenges to the ballots of James Cantrell, Daniel Johnson, Mike Lamburt and David Narbaiz be sustained and that the Union be certified as the collective bargaining representative of the employees in the unit described above as the remaining challenges are no longer determinative.



Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within ten (10) days from the issuance of this report, any party may file with the Board in Washington, D.C., eight (8) copies of exceptions thereto, with supporting brief is desired. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof together with a copy of any brief filed, on the other party and with the Regional Director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to this report, the Board, upon the expiration of the period for filing such exceptions may decide the matter forthwith upon the record or may make other disposition of the case.

DATED AT San Francisco, California, this 30th day of December, 1975.

/s/ Bernard T. Hopkins
Bernard T. Hopkins, Hearing Officer
National Labor Relations Board
Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

## Appendix E

United States of America

Before the National Labor Relations Board

Case 20-RC-12582

Pacific International Rice Mills, Inc.
Employer

and

Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
Petitioner

### DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held on April 25, 1975,[1]

[1]The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 25 for, and 21 against, the Petitioner. There were six challenged ballots. The Hearing Officer recommended that the Employer's four challenges be affirmed. No exceptions were filed to that recommendation. Accordingly, it is hereby adopted. Petitioner withdrew its two challenges at the hearing. Its challenges are hereby overruled. As a consequence of the above rulings, the challenged ballots are no longer determinative of the results of the election.

and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of Respondent's exceptions[2] and brief in support thereof, and hereby adopts the Hearing Officer's findings[3] and recommendations.

---

[2]In a supplement to its brief, the Employer argues that the Hearing Officer's alleged membership in an NLRB employee association prevented him from being impartial. Executive Order 11491, as amended, gives to each Federal employee the right to form, join, and assist labor organizations. We find nothing in the Hearing Officer's alleged membership which might prevent him from being impartial. Were we to base our assignment of work on our employees' membership or nonmembership in an employee collective-bargaining association, we would find ourselves in the same unhappy predicament as other employers find themselves when they affect their employees' working conditions or tenure on the basis of their membership or nonmembership in unions. This we will not do. To the extent that the Employer is of the view that a Board Hearing Officer, or any other employee, cannot be impartial simply because he or she belongs to an employee collective-bargaining association representing Agency employees, or performs management or supervisory duties for the Agency, a position with which we fully disagree and which is wholly unsupported, the Employer should address its contention to the President of the United States or to the Congress. It should be noted, however, that in order to avoid even the possible appearance of bias or prejudice on the part of Board personnel, sec. 3(d) of Executive Order 11491 provides:

> Employees engaged in administering a labor-management relations law . . . shall not be represented by a labor organization which also represents other groups of employees under the law . . . or which is affiliated directly or indirectly with an organization which represents such group of employees.

Furthermore, we have read the record closely and find no evidence of prejudice or bias on the Hearing Officer's part.

[3]The Employer has excepted to certain credibility resolutions of the Hearing Officer. It is the established policy of the Board not to overrule a Hearing Officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no sufficient basis for disturbing the credibility resolutions in this case.



## CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Chauffeurs, Teamsters, and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

> All production, warehouse, maintenance, and general labor employees, truckdrivers, and forklift operators employed by Pacific International Rice Mills, Inc., at Kentucky Avenue and Highway 113, Woodland, California, excluding office clericals, guards, and supervisors as defined by the Act.

Dated, Washington, D.C., April 2, 1976

Betty Southard Murphy, *Chairman*

Howard Jenkins, Jr., *Member*

Peter D. Walther, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

## Appendix F

United States of America

Before the National Labor Relations Board

Case 20-RC-12582

Pacific International Rice Mills, Inc.
Employer

and

Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
Petitioner

### ORDER DENYING MOTION

On April 2, 1976, the National Labor Relations Board issued a Decision and Certification of Representative[1] in the above-entitled proceeding in which it adopted the findings and recommendations of the Hearing Officer as contained in his Report of December 30, 1975, and certified the Petitioner as the exclusive representative of the employees in this appropriate unit.

Thereafter, on April 15, 1976, the Employer filed a Motion for Reconsideration, Rehearing, and to Reopen the Record requesting that the Board: (1) reconsider its decision in the above-entitled matter on the grounds that the decision does not comport with the evidence adduced before the Hearing Officer and that the credibility resolutions

[1] 223 NLRB No. 88.

of the Hearing Officer were improper, outrageous, and entirely without foundation; (2) rehear the Employer's objections to the election and to conduct affecting the results of the election on the ground that the Hearing Officer was a member of an NLRB employee association who supported his fellow union members and who, because of his membership in said labor organization, should not have been allowed to serve in a judicial capacity; and (3) reopen the record to adduce allegedly newly-discovered evidence consisting of testimony of impartial employees who would testify in support of the Employer's objections.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Employer's Motion for Reconsideration and for Rehearing be, and it hereby is, denied as it contains nothing not previously considered by the Board and that the Motion to Reopen the Record be, and it hereby is, denied as it fails to comply with Section 102.65 of the Board's Rules and Regulations, Series 8, as amended, because the evidence sought to be introduced does not appear to be newly discovered or unavailable prior to the close of the hearing.

Dated, Washington, D.C., May 19, 1976.

Betty Southard Murphy, *Chairman*

Howard Jenkins, Jr., *Member*

Peter D. Walther, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

Supreme Court, U. S.
FILED
SEP 11 1979
MICHAEL RODAK, JR., CLERK

No. 79-44

# In the Supreme Court of the United States

OCTOBER TERM, 1978

PACIFIC INTERNATIONAL RICE MILLS, INC.,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-44

PACIFIC INTERNATIONAL RICE MILLS, INC.,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 594 F. 2d 1323. The decision and order of the National Labor Relations Board (Pet. App. B1-B14) is reported at 228 N.L.R.B. 464. The Board's order denying petitioner's motion for reconsideration (Pet. App. C1-C4) is unreported. The Board's decision and certification of representative in the related representation proceeding (Pet. App. E1-E3) is reported at 223 N.L.R.B. 613. The Board's order denying petitioner's motion for reconsideration of that decision (Pet. App. F1-F2) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 5, 1979. The petition for a writ of certiorari was filed

on July 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board properly rejected petitioner employer's claim that it was entitled to a new hearing on its objections to an election won by a local affiliate of the Teamsters Union because the Board's hearing officer was allegedly a member of the National Labor Relations Board Union.

2. Whether the Board properly refused to hold a new hearing based on the employer's untimely allegation that the hearing officer belonged to a labor organization that was affiliated with the Teamsters.

## STATUTE AND EXECUTIVE ORDER INVOLVED

1. The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are:

> Section 8. (a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

2. The relevant provisions of Exec. Order No. 11491, 3 C.F.R. 861-875 (1966-1970 Compilation) are:

> Section 1. *Policy.* (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. * * *
>
> * * * * *
>
> Section 3. *Application.* * * * (d) Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.



## STATEMENT

1. Pursuant to a representation petition filed by Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "the Teamsters"), the Board's Regional Director conducted an election among petitioner's production and maintenance employees at its Woodland, California, facility (R. 6-8).[1] Twenty-five ballots were cast for the Teamsters, and 21 against, with six challenged (R. 9). Petitioner filed timely objections to the conduct of the election, and on July 1, 1975, the Regional Director ordered that a hearing be held on a majority of those objections and on the challenged ballots (R. 11-19). The hearing was conducted by a Board hearing officer on October 29 and 30, 1975; subsequently, the hearing officer issued a report resolving credibility issues and recommending that all objections be overruled, that the Teamsters' challenges to two ballots be overruled because the Teamsters had withdrawn those challenges, and that petitioner's challenges to four ballots

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[1] "R." references are to the formal documents reproduced as "Volume I, Pleadings" in the court of appeals.

be sustained. The hearing officer further recommended that the Teamsters be certified as the employees' collective bargaining representative since the overruled challenges were not determinative of the election (Pet. App. D1-D13). Petitioner filed exceptions to the hearing officer's report and later filed a supplemental brief contending that it was "informed and believe[d]" that the hearing officer "is a member of the National Labor Relations Board Union" ("NLRBU"); therefore, petitioner argued, it was entitled to a new hearing because the hearing officer could not resolve the credibility issues in an impartial manner (R. 134-135).

2. On April 2, 1976, the Board issued its decision and certification of the Teamsters as the employees' collective bargaining representative, adopting the hearing officer's findings and recommendations (Pet. App. E1-E3). In so doing, the Board rejected petitioner's claim that the hearing officer's alleged membership in the NLRBU prevented him from being impartial, noting that (Pet. App. E2 n.2):

> [Presidential] Executive Order 11491, as amended, gives to each Federal employee the right to form, join, and assist labor organizations. We find nothing in the Hearing Officer's alleged membership which might prevent him from being impartial. * * * To the extent that the Employer is of the view that a Board Hearing Officer, or any other employee, cannot be impartial simply because he or she belongs to an employee collective-bargaining association representing Agency employees, or performs management or supervisory duties for the Agency, a position with which we fully disagree and which is wholly unsupported, the Employer should address its contention to the President of the United States or to the Congress. It should be noted, however, that in order to avoid even the possible appearance of bias or prejudice on the part of Board personnel, sec. 3(d) of Executive Order 11491 provides:
>
> > Employees engaged in administering a labor-management relations law . . . shall not be represented by a labor organization which also represents other groups of employees under the law . . . or indirectly with an organization which represents such group of employees.
>
> Furthermore, we have read the record closely and find no evidence of prejudice or bias on the Hearing Officer's part.[2]



Petitioner moved for reconsideration and rehearing, but, on May 19, 1976, the Board denied the motion "as it contains nothing not previously considered by the Board" (Pet. App. F2).

3. Petitioner thereafter refused to bargain with the Teamsters, and on September 22, 1976, the Regional Director issued a complaint alleging that that refusal violated Section (a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (R. 149-151). In response to the General Counsel's contention that petitioner's answer to the complaint raised no issues requiring a hearing, the Board, on November 10, 1976, issued an order to show cause why a motion for summary judgment against petitioner should not be granted (R. 183). Petitioner's response, *inter alia*,

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[2]The Board also noted that (Pet. App. E2 n.2):

> [W]ere we to base our assignment of work on our employees' membership or nonmembership in an employee collective-bargaining association, we would find ourselves in the same unhappy predicament as other employers find themselves when they affect their employees' working conditions or tenure on the basis of their membership or nonmembership in unions. This we will not do.

was to argue for the first time, that a new hearing should be held because it believed that the NLRBU was affiliated with the Teamsters (R. 184-188). Petitioner gave no reason why such an allegation could not have been made during the representation proceeding and submitted no evidence in support of the allegation other than an affidavit from its attorney (stating only, "I am informed and believe that the employee organization to which the Hearing Officer belonged was affiliated with the Teamsters" (R. 190)) and a copy of the Teamsters International Constitution (which made no reference to the NLRBU) (R. 191-284)). On February 28, 1977, the Board issued its decision and order rejecting petitioner's defenses as matters which "were or could have been litigated in the prior representation proceeding,"[3] and therefore finding that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act (Pet. App. B1-B14).

Petitioner filed a motion for reconsideration arguing that it had alleged facts not presented in the representation proceeding—*i.e.*, the charge that the organization of which the hearing officer was allegedly a member was affiliated with the Teamsters. The Board denied this motion, noting, *inter alia*, that petitioner's contention was "untimely," since it was first raised in petitioner's response to the motion for summary judgment following the issuance of the unfair labor practice complaint. The Board explained that petitioner "was able to allegedly discover and argue the issue of the hearing officer's status

[3]Petitioner had denied in its answer to the complaint that the Teamsters had requested, and that it had refused, bargaining, but did not seek to controvert documentary evidence to the contrary appended to the General Counsel's motion for summary judgment. Therefore, the Board found that there had in fact been a bargaining request by the Teamsters, and that it had been rejected by petitioner (Pet. App. B4 n.3). These findings are not contested in this Court.



in a labor organization in the representation proceeding * * *. [I]t has not been shown that the organization's alleged ties to the [Teamsters] was evidence which was newly discovered or previously unavailable" (Pet. App. C3-C4).[4]

4. The court of appeals enforced the Board's order. In so doing, it rejected petitioner's claim that the hearing officer's very membership in a labor organization required his exclusion, noting that "[a] hearing examiner's membership in a union will not ordinarily violate an employer's right to a fair hearing," citing *Abbott Laboratories* v. *NLRB*, 540 F. 2d 661, 665 n.1 (4th Cir. 1976) and Exec. Order No. 11491 Pet. App. A7).[5]

Finally, the court upheld the Board's refusal to hold a hearing on petitioner's belated allegation that the union was affiliated with the Teamsters, agreeing that (Pet. App. A8-A9):

> In the absence of newly discovered or previously unavailable evidence or special circumstances, a [party] in an unfair labor practice proceeding is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. * * * [Petitioner] provides no justification for its failure to raise the question of union affiliation at the time of the representation proceeding when it first objected to the hearing examiner's union membership.

[4]Thus, the Board found it unnecessary to decide whether petitioner's allegation would have warranted a hearing where it "has offered not a single fact in support of its contention" (Pet. App. C4 n.3).

[5]The court further pointed out that petitioner had failed to make any showing that the union of which the hearing officer was allegedly a member was affiliated with any other union, and that "the record clearly evidences [his] impartiality" (Pet. App. A8).

## ARGUMENT

Petitioner urges that it was entitled to a de novo hearing in the representation proceeding before a hearing officer not a member of a labor organization and that the Board improperly denied it a hearing in the unfair labor practice proceeding on its belated contention that the hearing officer belonged to a union affiliated with the Teamsters. There is no merit to these contentions, no conflict among the circuits, and no issue raised which merits certiorari.

Petitioner's first complaint (Pet. 6-10) is that the hearing officer could not have been impartial because of his alleged membership in a union of employees of the National Labor Relations Board. Petitioner cites no authority for this proposition. While the Board will disregard the results of a hearing where the conduct of the hearing officer or administrative law judge displays evidence or appearance of bias (see, *e.g.*, *Filmation Associates, Inc.*, 227 N.L.R.B. 1721 (1977)), it will not presume bias merely because the trier of fact happens to be a member of a labor organization unaffiliated with any of the parties. That position is clearly correct. Cf. *Abbott Laboratories* v. *NLRB*, 540 F. 2d 662, 664 (4th Cir. 1976), where the court upheld the Board's rejection of a claim "that the Board's hearing officer should have disqualified himself because his possible membership in a union which admittedly had no interest in the litigation before him might nevertheless have led him to lack objectivity in judging the conduct of a Board agent who was a member of that union." Moreover, as noted by the Board (Pet. App. E2 n.2), Exec. Order No. 11491, which authorizes membership in labor organizations, explicitly states at Section 3(d) that federal employees dealing with labor-management law shall not be represented by organizations affiliated with unions operating under such



law. Thus, the Executive Order takes into account the potential problem raised by union membership of employees of the Board and effectively eliminates it. Here, as the court of appeals recognized (Pet. App. A8), petitioner made no allegation or showing in the representation proceeding that the NLRBU had any affiliation with the Teamsters or any other labor organization having dealings under the National Labor Relations Act. Therefore, the Board was presented with no reason to retry the representation case.[6] There is therefore no merit to petitioner's assertion (Pet. 11-13) that the Board's procedure vitiated the significance of Section 3(d) of the Executive Order. Petitioner simply made no timely, supported allegation to raise any issue thereunder.

Nor is there merit to petitioner's contention (Pet. 11-13) that the Board improperly refused to grant a hearing on its belated assertion, in response to the motion for summary judgment in the unfair labor practice proceeding, that the NLRBU was affiliated with the

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[6]It is well settled that absent some evidence supporting an objection that would indicate a basis for reversal, no hearing is required on such objection. See 29 C.F.R. 102.69(d); *NLRB* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 178 (6th Cir.), cert. denied. 389 U.S. 958 (1967); *NLRB* v. *Sauk Valley Mfg. Co.*, 486 F. 2d 1127, 1133 (9th Cir. 1973).

Contrary to petitioner (Pet. 13-14), bias is not indicated because the hearing officer credited the testimony of Daniel Barrus. Where a witness may have been untruthful or confused on a point not relied upon for decision, the trier of fact need not discredit the witness' relevant testimony, since the trier need not believe all of a witness' testimony before he may believe any of it. *NLRB* v. *Universal Camera Corp.*, 179 F. 2d 749, 754 (2d Cir. 1950), vacated and remanded on other grounds 340 U.S. 474 (1951). In any event, the court of appeals, based on an assessment of the record set out in its opinion (Pet. App. A6), found that "substantial evidence in the record supports the reasoning underlying [the hearing officer's] credibility determination" (Pet. App. A5).

Teamsters in violation of Section 3(d) of Exec. Order No. 11491. Petitioner made no showing that the allegation was based on evidence not available to it at the time of the underlying representation proceeding. Therefore the Board properly refused to consider the allegation, since an employer may not raise as a defense to a charge of unlawfully refusing to bargain with its employees' certified representative any matter it could have litigated (but did not) in the certification proceedings. See 29 C.F.R. 102.65(e)(1) and 102.67(f); *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 141 (1971); *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 161-162 (1941).[7]

[7]In any event, petitioner provided no evidence whatsoever to support its claim; thus, even if this defense had been timely, Board rejection without a hearing would have been warranted.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Solicitor General*

JOHN S. IRVING
*General Counsel*

JOHN E. HIGGINS, JR.
*Deputy General Counsel*

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*Acting Associate General Counsel*

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SEPTEMBER 1979

DOJ-1979-09